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No. 559

Supreme Court of the United States

October Term, 1953

ELLSWORTH JOHNSON and NAT PETTIGREW,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN J. DUFF,
Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on December 5, 1953, affirming a judgment of conviction in this criminal cause entered on June 12, 1953 in the United States District Court for the Southern District of New York.

Opinions Below

There was no opinion in the District Court.

The affirmance in the United States Court of Appeals for the Second Circuit was by Swan, *Ch. J.*, and Frank

and Medina, *JJ.* The *per curiam* opinion has not as yet been reported, but is printed at the end of the within petition and brief, and a copy of the same is also set forth at the end of the certified copy of the record submitted herewith.

Jurisdiction

The jurisdiction of this Court is invoked under Rule 37(b) of the Rules of Criminal Procedure and Title 28, Section 1254, United States Code.

Questions Presented

In the instant case, under an indictment[1] charging that the petitioners, and two co-defendants who pleaded guilty, unlawfully received, sold and facilitated the transportation, concealment and sale of narcotic drugs on March 8, 1951 and on March 12, 1951, in violation of law,[2] and that petitioners and their co-defendants conspired to violate various statutes of the United States concerning traffic in narcotics,[3]

1. Was it not prejudicial error on the part of the trial court to deny petitioners' application for an order setting aside and vacating the convictions herein, and for a new trial, on the ground of newly discovered evidence and the perjury of the prosecution's principal witness, James S. Hunter?

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1. Indictment is set forth at pp. 18-21 of Transcript of Record.
2. Title 21, Sections 173-4, United States Code.
3. Title 18, Section 371, United States Code.

2. Was it not prejudicial error on the part of the trial court to refuse to allow the testimony of one David Mindlin concerning the cashing of checks by one Flash Walker?

The record is properly and amply protected by objection and exception in each instance, and in the case of "1" by specification in the petitioners' Notice of Appeal (355, 244, 292).[4]

In sum, did not the errors set forth above constitute a deprivation and impingement of petitioners' rights, under the Fifth and Sixth Amendments to the United States Constitution, to a fair and impartial trial and due process of law?

Statutes Involved

TITLE 21, SECTION 173, UNITED STATES CODE

173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.* It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

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4. Figures in parentheses, unless otherwise indicated, refer to pages of printed Transcript of Record.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

TITLE 21, SECTION 174, UNITED STATES CODE

Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.

174. Same; penalty; evidence. If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing

the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

TITLE 18, SECTION 371, UNITED STATES CODE

371. *Conspiracy to Commit Offense or to Defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Statement

The facts may be briefly stated, as follows:

The Prosecution's Case

1. *Narcotics Sale of March 8, 1951*

James S. Hunter, a special employee of the Federal Bureau of Narcotics, testified that on March 8, 1951 he met petitioner Johnson, whom he knew, in a luncheonette on 133 Street, near Seventh Avenue, New York City (36). He told Johnson that a friend of his (Hunter's) had come to New York with him for the purpose of purchasing heroin. Johnson inquired "Well, how much heroin would your friend be interested in?", to which Hunter replied that his friend would be interested in two pieces (two ounces). Johnson stated that the price would be $450. (37-8).

Johnson stated he would have to have the money, and he would then tell Hunter when and where he could pick the heroin up (39). It was agreed that Johnson would telephone Hunter at the Hotel New Yorker at about three o'clock that afternoon (39). At the appointed hour Johnson telephoned Hunter at the New Yorker, where the latter and Agent Newkirk were in a room. Johnson directed the witness to meet him at the Hotel Theresa, on the second floor mezzanine, and bring the money (39, 40). Agent Newkirk then searched Hunter, gave him $450., and drove him to the Hotel Theresa (40, 92-3), where the witness met Johnson and handed him $450. Johnson told him to meet him at seven o'clock in front of the Hotel Theresa, at which time he could pick up "the stuff" (40).

Hunter returned at seven o'clock and was met by one Frank Brooks (a co-defendant who pleaded guilty). After a conversation with Brooks, Hunter went to a nearby bar, where he was met by petitioner Pettigrew, who handed Hunter a card on which was a name and address and telephone number (40, 41, 93, 152), and told him to call the number at eight o'clock to arrange to pick up "the stuff" (42).

At about 8 P.M. Hunter made the telephone call, as a result of which call he and Newkirk went to a nearby bar, the Zambesi Club (45, 46, 94). A few minutes later Frank Brooks entered and spoke with Hunter (46, 94-5). Brooks then took Hunter to 124 West 134 Street, apartment 16. Shortly thereafter Pettigrew came to the apartment (45-47). Pettigrew gave Brooks his ring and watch as a guarantee to cover the money given. Brooks then returned to the Zambesi Club, where he met Newkirk. Shortly thereafter the witness, Newkirk and one "Rags" Cartwright returned to the same apartment 16. Pettigrew came to the apartment, and he and "Rags" entered a rear room. When they emerged "Rags" handed Hunter two glassine containers containing a white powder which he put in his pocket, and he then left (48-50), after returning to Pettigrew the latter's ring and watch (51).

2. *Narcotics Sale of March 12, 1951*

On the above date, at about 9 P.M., at 134th Street, east of Seventh Avenue, New York City, Hunter, according to his testimony, introduced Newkirk to petitioner Johnson as "Bill * * * the fellow that comes up from Buffalo to get the stuff" (53, 100). Johnson inquired of Newkirk

how much "stuff" he was interested in, to which the latter replied that he wished to purchase three ounces of heroin, which Johnson said he believed would cost $675. (54, 101). Hunter, Newkirk and Johnson then entered a hallway, where Newkirk counted out and gave to Johnson $675. (54, 102). Johnson gave the money to Hunter, directing him to "give it to Nat [Pettigrew]" (54, 102). Johnson said to tell Pettigrew to give Hunter three pieces of heroin (102), which was done.

On cross-examination Hunter testified that he had been convicted of fraud twice, larceny three times, gambling three times and possession of narcotics (59, 60). He had been a special employee of the Narcotics Bureau for three or four years (64). He received $10. a day as compensation, together with his room rent (65). His job was to introduce the agent to narcotics peddlers (66). He denied being a user of narcotics, though he could not say what the marks (four of them) on his arm were. He denied that he ever possessed, delivered, bought, sold or used narcotics (82-3). He was closely associated with narcotics dealers through gambling (89, 90).

Agents Newkirk, Chappelle and Jackson testified for the Government, but inasmuch as their testimony is not material to the determination of this application, petitioners merely refer to the fact of their having testified.

The Defense

Petitioner Johnson testified that in March of 1951 he met Hunter and Agent Newkirk in his (Johnson's) store (220). That Hunter told him that Newkirk had a very good business, and he assumed he was referring to the

numbers business. That after some conversation Johnson said to Newkirk "I saw you and Jimmie Fletcher and two blonde girls down at Small's, and you are an agent", and that he then turned around and walked away from them. That a little over a month later Newkirk came over to him on the street and said "Nat Pettigrew was arrested by the State, and you bailed him out. I am just giving you a friendly warning. We have a warrant for his arrest. If we grab him, we don't want you nor no one else busting in". That he knew Pettigrew since he was seven years old; that Pettigrew fed him "when I was unable to feed myself". That he walked away from Newkirk (222-3). That in 1951 he was in the dry cleaning business, with several partners, under the name of Walgrew Cleaning Corporation. He denied that he ever spoke to Hunter about narcotics. He denied that he went into the lobby of a building and that Newkirk counted out some six hundred dollars and gave it to him. He had been convicted of burglary, assault, attempted grand larceny and gambling (224-5). Asked on cross-examination if he knew one Flash Walker, he stated that he did (229). Flash Walker was extorting money from a girl, and cashing checks received from her through Johnson's business. When Johnson learned of this, and that payment had been stopped on the checks, he knocked Walker down. Walker then made threats against Johnson and approached two people to plant narcotics on him (235-9). Johnson has never been engaged in the drug traffic (231).

Frank Brooks and Horace ("Rags") Cartwright, co-defendants who had pleaded guilty, testified that they did not know Johnson or Pettigrew prior to their arrest in this case, but that they knew Hunter. They testified as to

two sales of heroin to Hunter in March, 1951, implicating themselves, but exculpating Johnson and Pettigrew.

Theodore Harris testified that Johnson was with him from 6 P.M. until 12 midnight on March 12, 1951; that they had left together for Brooklyn at 6 P.M. and did not return to Harlem until 11:30 P.M. (207-8).

Frederick Walker, called as a rebuttal witness by the Government, testified that he is also known as Flash Walker, and had been convicted of two sales of narcotics (240). That he started to work for Johnson in 1949; that he was in the numbers business with him, and later in the narcotics business, also with Johnson (241). Johnson asked him if he would like to pick up packages, and told him he would receive $10. for each trip he made. That he would pick up eight to nine ounces a week (243). On cross-examination he stated that Johnson and he had had a fight because he had insulted Johnson's daughter (252).

Lovie Hamilton testified that she is a hat check girl (283). That Flash Walker had been her boy friend (284). That in January, 1951 Flash Walker came to her apartment and sought to leave a package with her, which he said contained dope, and asked her to plant it in Johnson's house, as she and Mrs. Johnson were good friends. She said she couldn't do that. Walker then threatened to kill her. He left with the package. She moved to another hotel to get away from him (285-6).

Petitioner Johnson, recalled as a witness, denied that Flash Walker ever delivered any narcotics for him (290).

David Mindlin, called by the defense, testified that he is a licensed check casher, and had been engaged in that

business for about seven years. He knew Johnson. To the question whether he recalled an occasion when certain checks cashed by him were returned marked "Stopped Payment", the objection of the District Attorney was sustained by the Court, to which ruling defendant excepted (291-2).

After petitioners' conviction, a motion was made on their behalf for an order setting aside and vacating the conviction and for a new trial on the ground of newly discovered evidence, and on the further ground that the Government's principal witness, Hunter, had given perjured testimony upon the trial. The witness had testified that he had never possessed or sold narcotics (82-3). There was submitted to the Court, in support of said motion, an excerpt from the testimony in *U. S.* v. *Louis Taylor,* in which this same Hunter testified as a Government witness, and admitted on cross-examination that he was then serving a jail sentence for possession and sale of narcotics, *to which he had pleaded guilty* (344-5). The motion for an order setting aside and vacating the conviction herein was denied.

The denial of the said motion was urged upon the Appellate Court, in petitioners' brief and argument, as grounds for reversal of the conviction, as was the refusal of the trial court to allow the testimony of Mindlin, the check casher, concerning the cashing of certain checks by Walker.

ARGUMENT

POINT I

Petitioners' constitutional rights to a fair and impartial trial and due process of law, under the Fifth and Sixth Amendments of the United States Constitution, were nullified by the Court's denial of your petitioners' motion for an order setting aside and vacating their conviction and for a new trial.

The facts have been adverted to in the petition.

The rulings which petitioners cite as a denial of a fair and impartial trial and due process of law constitute a cumulative complex which in the aggregate produced the result to be expected—petitioners' conviction. It is earnestly urged that it would be a mockery to say that the rulings cited herein do not "offend those canons of decency and fairness which express the notions of justice of English speaking peoples" (*Rochin* v. *California,* 96 L. ed. 157).

The rulings here complained of are pregnant with essential unfairness, for the very reason that they resulted in petitioners' conviction on testimony which was, among other things, undeniably and admittedly perjured. The substance of fairnenss, distilled from centuries of experience as essential to the administration of justice, required the granting of petitioners' motion for a new trial.

James S. Hunter was the Government's principal witness, upon whose testimony the prosecution's case would either stand or fall. He it was who, according to his testimony, made the initial contact with petitioners, and who introduced Agent Newkirk to Johnson as his friend

Bill from Buffalo, who also wished to purchase narcotics (36-7, 52-3). It is fair to say that his testimony was the touchstone by which the trustworthiness of the Government's case is to be judged.

On cross-examination this witness admitted having been convicted of various crimes, *e.g.,* gambling, larceny and possession of narcotics. Despite his conviction for drugs, however, he flatly denied that he had ever used or sold narcotics (87). After the conviction herein, and before sentence, it came to the attention of defense counsel that this witness *had pleaded guilty* to the *possession and sale* of narcotics. As an exhibit attached to the moving papers on the motion for a new trial, there was appended an excerpt from the testimony of this witness, given in another case, in which the witness admitted that he was then serving a jail sentence in Dauphin County, Pennsylvania, *having pleaded guilty* to the *possession and sale* of narcotics (344-5).

Upon the argument, counsel strenuously importuned the Court to grant the motion, pointing out that had the witness not perjured himself, and had he admitted having previously sold narcotics, counsel could have then engaged in a cross-examination of the witness designed to develop if he had not turned informer in order to protect and in effect receive a license to pursue his own illicit activities—whether there was not, in fact, a conspiracy between the witness and the agent "not alone to protect this witness's own activities in the business, but also to go out, set up and frame people so as to protect the informer" (327).

It would be a masterpiece of understatement to say that this thought, properly elaborated and developed by de-

fense counsel, might, conceivably, have had a very decided impact on the cumulative thinking of the jury, for a study of the case shows how slender was the thread on which its decision hung. The witness could have been asked, for example, whether he had framed these petitioners in order to give the appearance of aiding the Government while diverting attention from his own illegal activities. To assume what his answers would be is, of course, speculative; assuming, however, that they consisted of categorical denials, it would have remained for the jury, with full opportunity to observe and assess the witness's demeanor while on the stand, to determine whether or not he was, in fact, telling the truth in this instance.

Unless this Court is prepared to lay down the rule (a supposition which we instinctively reject) that there are two standards of conduct for witnesses, one for those who testify for the Government and another for those called by the defense, it must be clear that the trial court erred in denying the motion for a new trial. Had Hunter testified, instead, for the defense, his indictment for perjury based on the concealment of a most material fact would be a foregone certainty.

The doctrine of disclosure, a principle the reassertion of which is never untimely, finds learned support in the decisions of this Court. A conviction of using the mails to defraud was reversed by this Court based on the mere refusal by the trial court to compel the Government's principal witness to disclose her residence address at the time of trial. In that case (*Alford* v. *United States,* 282 U. S. 687), Mr. Justice Stone, speaking for the Court, said:

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross examination.

> For that reason, it is necessarily exploratory, and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them."

The rule set forth above was followed in *Du Beau* v. *Smither and Mayton,* decided as recently as April 16, 1953, and reported in 203 F. (2d) 396.

It is indeed difficult to conceive of any legitimate reason for the trial court's denial of the motion. Petitioners were unquestionably prejudiced by Hunter's denial that he had ever used or sold narcotics. His denial prevented them from placing the witness in his proper setting before the jury as one who dealt in narcotics, and also prevented them from putting the credibility of his testimony to a true test, so that the jury could have intelligently, fairly and fully appraised his testimony, as well as that of the agents.

The disclosed rationale of the opinion of the Circuit Court of Appeals in affirming the judgment of conviction herein is, petitioners respectfully urge, specious at best. Admittedly a motion of this nature is addressed to the discretion of the trial judge, but a denial of the motion cannot survive a showing of abuse of discretion such as in the case at bar. This salutary rule should be observed in spirit, as well as in letter. Without further laboring the point, the unblinkable fact is that the witness, knee-deep in perjury, denied having sold narcotics, when in fact he had pleaded guilty to that very thing.

A motive, interest or prejudice of a witness may be shown (*Farkas* v. *United States,* 2 F. (2d) 644; *Furlong* v. *United States,* 10 F. (2d) 492). Any motive, interest or prejudice that the witness Hunter may have had could not have been explored on cross-examination because of his denials under oath that he had ever dealt in or sold narcotics.

It is impossible to sustain the trial court's ruling.

POINT II

Petitioners' constitutional rights to a fair and impartial trial and due process of law, under the Fifth and Sixth Amendments of the United States Constitution, were nullified by the action of the trial court in refusing to allow the testimony of Mindlin, the check casher.

As was pointed out under the Statement, one Flash Walker was permitted to testify, as a rebuttal witness, that petitioner Johnson was engaged in the narcotic traffic from in or about July or August, 1949 to November, 1950 (244) —at a time without the dates mentioned in the indictment. Johnson testified that Walker was extorting money and checks from a girl and cashing the checks through Johnson's business with a check cashier, one David Mindlin. Johnson was advised of these facts, confronted Walker and knocked him down. Walker then made threats against Johnson and approached two people to plant narcotics in his home (235-9).

When Walker was produced by the Government as a rebuttal witness, he categorically denied the entire ex-

tortion incident (251-3). Petitioner Johnson then produced the licensed check cashier, Mindlin, to testify about the checks in question having been cashed by Flash Walker. His testimony was excluded by the trial judge (290-2).

Assuming even a modicum of truth in Johnson's testimony concerning Walker's motive for testifying falsely against him, was it not highly important, indeed imperative, that he call Mindlin as a witness in support of the claimed motive of revenge on the part of Walker, by showing that Walker did in fact cash the checks? Not alone that, but the testimony sought to be adduced was extremely pertinent in order to put Walker in his true setting as an extortionist, so that the jury might more intelligently assess his testimony.

Walker's testimony was damaging in the extreme, as showing Johnson to have been engaged in the narcotic traffic at times other than those mentioned in the indictment. The very minimal requirements of justice and fair play called for the allowance of Mindlin's testimony, for whatever effect it may have had on the jury's view of the credibility of Flash Walker. It was competent and admissible (*Alford* v. *United States, supra,* 687; *Farkas* v. *United States, supra,* 644; *Furlong* v. *United States, supra,* 492).

Such ruling by a trial judge results in a subtle erosion of the constitutional guarantees afforded an accused by the Fifth and Sixth Amendments to the United States Constitution, of a fair and impartial trial and of due process of law. This is what occurred in the instant case.

CONCLUSION

The right to a fair trial and due process of law, under the Fifth and Sixth Amendments of the United States Constitution, are the cornerstone of the arch of our way of life. There are now, as there have always been, those who would prefer expediency. This Court has had to take corrective action time and again when the proper course needed to be pointed, when erroneous concepts required disapproval.

The invasion of due process of law—more accurately, the evasion thereof—disclosed by this case is the more insidious because it occurred in the course of a trial involving a crime which, by its very nature, is viewed everywhere with revulsion. It is to be hoped that petitioners will not be prejudiced by the nature of the crime charged, for the important, vital questions presented by this case cry out for answer.

The Writ of Certiorari should be granted.

Respectfully submitted,

JOHN J. DUFF,
Counsel for Petitioners.

APPENDIX

OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 97–98—October Term, 1953.

(Argued November 9, 1953 Decided December 4, 1953.)

Docket Nos. 22849-22850

UNITED STATES OF AMERICA,

Appellee,

—v.—

ELLSWORTH JOHNSON, also known as "BUMPY," and NAT PETTIGREW,

Defendants-Appellants.

Before:

SWAN, FRANK and MEDINA,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Dimock, *Judge.*

These are consolidated appeals from judgment of conviction and sentence upon indictments charging conspiracy to sell narcotics and the making of two sales of heroin. Judgments affirmed.

HENRY A. LOWENBERG, *Attorney for appellants.*

J. EDWARD LUMBARD, *United States Attorney, for appellee;* James B. Kilsheimer, III, and Frederic S. Nathan, Assistant United States Attorneys, of Counsel.

Appendix (Opinion)

PER CURIAM:

Each of the appellants was found guilty upon trial to a jury of selling heroin on two occasions and of conspiring to sell narcotics. Johnson was sentenced to five years on each of the three counts, to run consecutively, and was fined a total of $9,000. Pettigrew was given prison sentences totaling twelve years. Before sentence was imposed the appellants moved for a new trial on the ground of newly discovered evidence and perjured testimony. The denial of this motion is the principal error urged on the appeal.

A motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial judge, and a denial of the motion will be reversed on appeal only if an abuse of discretion appears. *United States* v. *On Lee*, 2 Cir., 201 F. 2d 722, 723, cert. den. 345 U. S. 936; *United States* v. *Forzano*, 2 Cir., 190 F. 2d 687, 689; *United States* v. *Cordo*, 2 Cir., 186 F. 2d 144, 148; cert. den. 340 U. S. 952. We see no such abuse in the case at bar. The first witness for the prosecution was a special employee of the Federal Bureau of Narcotics named Hunter. Without reciting his testimony in detail it will suffice to say that he made contact with the appellants in connection with the sales of heroin of which they were convicted. On direct examination he admitted several convictions of crime. On cross-examination the defense brought out that one of the convictions was for possession of narcotics, but the witness stoutly denied that he was a user of narcotics or had ever sold them. Counsel's affidavit supporting the motion for a new trial asserted that Hunter's testimony that he had never sold narcotics was perjury and was proved to be

such by testimony he had given more than a year before in another narcotics prosecution in the same court against Louis Taylor and others. In the *Taylor* case he had testified that he had previously pleaded guilty in a Pennsylvania state court to possession and sale of narcotics and possession of firearms. Counsel argues that Hunter's perjurious denial in the appellants trial that he had ever sold narcotics prevented further cross-examination which might have had great influence with the jury. Two of the requirements which must be met to warrant granting a new trial on the ground of newly discovered evidence are (1) that the evidence must in fact be newly discovered, and (2) that the movant has been diligent in discovering it. See *United States* v. *On Lee, supra,* p. 723, note 3. The appellants have made no showing whatever as to when they discovered Hunter's testimony in the *Taylor* case, nor as to their diligence in seeking to discover it. Furthermore, they disclosed to Judge Dimock only part of Hunter's testimony which is claimed to prove his perjury. Other excerpts from his testimony in the *Taylor* case have been printed as an appendix to the appellee's brief. These excerpts show that the police arrested him for possessing firearms, and found on his person capsules of heroin; that he had taken these from his "lady friend" and never attempted nor intended to sell them, nor to use them for himself; and that although he pleaded guilty to "possession and sale," in fact he was guilty only of possession. Normally, of course, an appellate court will not consider facts not brought to the attention of the court from which the appeal is taken. "But in exceptional cases, as high authority shows, the dictates of logic will yield to the

demands of justice, and the courts, in order to reach a just result, will make use of established and uncontroverted facts not formally of record in the pending litigation." *Morse* v. *Lewis,* 4 Cir., 54 F. 2d 1027, 1029, cert. den. 286 U. S. 557. We think this principle is applicable to the appellants' motion for a new trial. The *Taylor* case was tried in the same court as the appellants' case. Judge Dimock could have taken judicial notice of that part of Hunter's testimony which disproves the alleged perjury. Under these circumstances we believe we are justified in considering it. Hunter's testimony in the *Taylor* case, when all of it is considered, does not sustain the movants' claim that he perjured himself in denying that he had ever sold narcotics.

As to the conduct of the trial only two errors are alleged. They merit little discussion. Walker's rebuttal testimony that Johnson had been engaged in the narcotic business in 1949 and 1950 was clearly admissible: (1) to impeach Johnson's own testimony that he had never engaged in that business, and (2) to negative the defense of entrapment. See *Sorrells* v. *United States,* 282 U. S. 435, 451; *United States* v. *Sherman,* 2 Cir., 200 F. 2d 880, 882. The exclusion of Mindlin's testimony was within the trial court's discretion to limit testimony on a collateral issue. See *United States* v. *Hiss,* 2 Cir., 185 F. 2d 822, 832.

Judgments affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 559

ELLSWORTH JOHNSON AND NAT PETTIGREW,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 360-362) is reported at 208 F. 2d 404.

JURISDICTION

The judgments of the Court of Appeals were entered on December 4, 1953 (R. 363-364). On December 28, 1953, Mr. Justice Reed extended the time for filing a petition for a writ of certiorari to and including February 1, 1954 (R. 365). The petition was filed on January 29, 1954. The jurisdiction of

this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in denying a motion for a new trial on allegedly newly discovered evidence.

2. Whether the trial court abused its descretion in refusing to admit testimony of petitioners' witness, offered solely for the purpose of impeaching the Government's rebuttal witness.

STATUTES AND RULE INVOLVED

21 U.S.C. (1946 ed.) 173 provides in part as follows:

> *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.*—It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

21 U.S.C. (1946 ed.) 174 provides as follows:

> *Same; penalty; evidence.*—If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

18 U.S.C. (Supp. V) 371 provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such con-

spiracy shall not exceed the maximum punishment provided for such misdemeanor.

Rule 33 of the Federal Rules of Criminal Procedure provides as follows:

> The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT

Two indictments (R. 16-21), one charging petitioners Johnson and Pettigrew and three others with substantive narcotics offenses and the other with conspiracy to commit such offenses, were filed, on June 4, 1951, in the District Court for the Southern District of New York (R. 1, 9). The substantive indictment (R. 16-17) charged, in two counts, that on or about March 9 and March 12, 1951, petitioners and others "unlawfully did receive, conceal, sell and facilitate the transportation, concealment and sale," respectively, of 906 grains and 1138 grains of heroin, in violation of 21 U. S. C.

173 and 174. The other indictment (R. 18-21) charged that on March 8, 1951, petitioners and others had conspired to violate 26 U. S. C. 2553(a) and 2554(a) and 21 U. S. C. 173 and 174, and alleged as overt acts the negotiations relating to the sales of narcotics charged in the substantive indictment.

At a consolidated trial, both petitioners were found guilty as charged in the two indictments (R. 5, 13, 323). Johnson was sentenced to 5 years' imprisonment and a $2,000 fine on each of the two counts of the substantive indictment and to 5 years' imprisonment and a $5,000 fine on the conspiracy indictment, the three terms of imprisonment to run consecutively (R. 6, 13-14, 336, 348-349, 352-353). Pettigrew was sentenced to 4 years' imprisonment and a $1.00 fine on each of the two counts of the substantive indictment and 4 years' imprisonment and a $1.00 fine on the conspiracy count, the three terms of imprisonment to run consecutively (R. 6, 14, 346-347, 350-351).

The evidence adduced at the trial may be summarized as follows:

The Government's Evidence.—About 11:00 a. m., March 8, 1951, one Hunter, an informer who was engaged in "undercover investigations" with federal narcotics agent Newkirk, accosted petitioner Johnson in a New York City luncheonette and told him, "I would like to see you on some business" (R. 36-37, 91). Outside the luncheonette, observed by a narcotics agent, Hunter told Johnson that he had come from Buffalo with a friend in order to purchase "at least two pieces," *i.e.*, two ounces, of

heroin (R. 37-38, 134-135, 148, 102). Johnson replied that it would cost $450 for that amount (R. 38). Later he told Hunter: "This is the way I do the business. I got to have the money and then I will tell you when and where you can pick the stuff up" (R. 38-39). They then agreed that Johnson would telephone Hunter at the Hotel New Yorker at about 3:00 o'clock that afternoon (R. 39). At the agreed time, petitioner, overheard by agent Newkirk, telephoned Hunter at the hotel and instructed the latter to meet him with the money at the second-floor mezzanine of the Hotel Theresa (R. 39, 92). Then, agent Newkirk, after searching Hunter, furnished him with $450 from "Government advance funds" and drove him to the Hotel Theresa (R. 40, 92-93, 109).

In the hotel, Hunter handed $450 to Johnson, who then told him, "Meet me tonight at 7:00 o'clock in front of the Hotel Theresa and you will be able to pick up the stuff" (R. 40). After Hunter emerged from the Hotel Theresa, agent Newkirk drove him to the Hotel New Yorker, where a search of Hunter revealed that he had no money in his possession (R. 93). At 7:00 p. m. that night, Frank Brooks, observed by two narcotics agents, approached Hunter in front of the Hotel Theresa (R. 40, 93, 152). As a result of a conversation with Brooks, Hunter proceeded to a local tavern, where he was approached by petitioner Pettigrew (R. 41, 152). Pettigrew, after asking Hunter if he had "business" with petitioner Johnson, told him that the latter was not coming as arranged and gave him a calling card (R. 42, 45, 93, 153; Gov. Ex. 1, R. 94).

He then instructed Hunter to telephone the number appearing thereon at 8:00 p. m. to arrange to pick up "the stuff" (R. 42).

At 8:00 o'clock that night Hunter, accompanied by agent Newkirk, telephoned the number he had been given (R. 45-46, 94). As a result of the telephone conversation, Hunter and agent Newkirk went to the Zambesi Club (R. 46, 94). From there, Hunter was taken by Frank Brooks to Cartwright's apartment in New York City, where he met Cartwright and another person, known as "Kid" (R. 47, 94-95). Shortly thereafter, petitioner Pettigrew arrived. When Hunter complained about the slowness in obtaining delivery of the narcotics, Pettigrew gave him his watch and ring as collateral for the money Hunter had paid Johnson. (R. 47-48, 96.) Hunter then returned to the Zambesi Club. A short time later Cartwright came in and called him back to the apartment (R. 48, 49, 96). Shortly after midnight, petitioner Pettigrew again entered the apartment and went with Cartwright into a back room (R. 49-50, 52). Upon emerging therefrom, Cartwright gave two glassine envelopes, containing a white powder, to Hunter, who then returned the watch and ring to Pettigrew (R. 50, 51). Hunter then rejoined Newkirk, and together they joined two other agents, to one of whom Hunter turned over the glassine envelopes, which contained, together with certain adulterants, 906 grains of heroin (R. 51-52, 96-99, 135-138, 150-151; Gov. Ex. 2-C, R. 152).

About 9:00 p. m. on March 12, 1951, on a street in New York City, Hunter introduced agent New-

kirk to petitioner Johnson as "the fellow that comes up from Buffalo to get the stuff" (R. 52, 53, 99-100). Newkirk told Johnson that he wanted to know the man he dealt with so that if the "stuff" was not good he could get his money back, and Johnson replied that "he was a man that stood behind his product and if it wasn't good he could get his money back" (R. 53-54, 100-101). Agent Newkirk told Johnson that he desired 3 ounces of heroin and gave him $675 therefor (R. 54, 101-102, 139, 149-150). Johnson then handed the money to Hunter, telling him to give it to Pettigrew in return for three "pieces" (R. 54, 102). Hunter proceeded to Cartwright's apartment, where he handed the money to petitioner Pettigrew, who told him to come back at 10:00 o'clock that night (R. 54-56).

Around 10:00 p. m. Hunter returned to the apartment, where Cartwright gave him 3 brown envelopes, each containing a "cellophane container with a white powder in it" (R. 56-57). Hunter then rejoined agent Newkirk to whom he handed the three envelopes, the contents of which amounted to 1138 grains of heroin in adulterated form (R. 57-58, 103-105, 139-143, 151; Gov. Ex. 3-D, R. 152).

Narcotics agent Chappell testified that petitioner Johnson, after his arrest on May 9, 1951, admitted that in a conversation with agent Newkirk the day before he had discussed the incident of March 12, 1951, when he directed Hunter to get narcotics from petitioner Pettigrew, but he explained that his conversation "was a big joke * * * because he knew who Agent Newkirk was, and that he thought

Agent Newkirk was kidding with him, and he was just kidding back" (R. 143-144, 107-108).

Cross-examination of Hunter by the defense.— Hunter was cross-examined by the defense concerning his criminal record,[1] in part, as follows (R. 59-61):

> Q. These 9 or 10 times, I will ask you to describe in each instance what you were convicted of.
>
> Mr. O'Brien: You mean the specific crime?
> Mr. Lowenberg: The specific crime.
>
> Q. What crimes were you convicted of? A. Gambling, larceny, possession.
> Q. Possession of what? A. Of narcotics.
> Q. Narcotics, yes. How many times were you convicted of possession of narcotics? A. Once.
> Q. Were you a user of narcotics? A. I beg your pardon.
> Q. Were you a user of narcotics? A. No.
> Q. Were you a dealer of narcotics at that time? A. No.
>
> * * * * *
>
> Q. What other crimes were you convicted of? You mentioned gambling, you mentioned narcotics. What else? A. Larceny.
> Q. What else? A. Fraud.
> Q. Fraud? A. Yes.
> Q. How many times were you convicted of fraud? A. Twice.

[1] In his direct testimony he admitted about nine or ten prior convictions (R. 35-36).

Q. How many times were you convicted of larceny? A. Three times.

Q. So that is five convictions; right? A. Yes.

Q. How many times were you convicted of gambling? A. Three times, I think.

Q. That is 8 convictions. And once for narcotics, did you say? A. That's correct.

Q. Any other crimes? A. No.

Later in his cross-examination Hunter testified as follows (R. 87, 89):

Q. Now, Si, you never sold narcotics, did you? Did you ever sell narcotics? A. No.

* * * * *

Q. Isn't it a fact that you were a user and seller of narcotics in Buffalo; yes or no.

* * * * *

A. I explained to you before that I have never used narcotics and have never sold any narcotics.

Evidence for the defense.—Petitioner Pettigrew did not testify in his own behalf, but petitioner Johnson did testify (R. 219-239). He denied that he had had any dealings with either Hunter or agent Newkirk on the dates of their narcotics transaction in March 1951, and he denied, on cross-examination, that he had ever dealt in narcotics (R. 224-225, 231). He also testified, on cross-examination, that he had once employed Frederick Walker in his "numbers bank," but that he had discharged him after he learned that Walker was extorting checks from a girl and cashing them

through the numbers bank, which used a local check-cashing agency (R. 229-230, 235-238). As a result of that incident he had an argument with Walker in the course of which he "knocked him down," and Walker later threatened "to get even" with him (R. 238, 239).[2]

The Government's rebuttal.—In rebuttal, Frederick Walker testified for the Government that from April 1949 to November 1950, he had worked for Johnson, first as a numbers "runner" and then in delivering heroin for Johnson's customers (R. 240-244, 246). On cross-examination by the defense, he admitted that he and Johnson had "had a fight," during which Johnson cut him, but he denied that he had threatened Johnson with revenge (R. 252-253, 261). He explained that the fight was the result of Johnson's accusation that he had "insulted" Johnson's daughter, and he denied that he had ever had an argument with Johnson over any checks (R. 259-261, 252).

The defense's rebuttal.—Petitioner Johnson, in rebuttal of Walker's testimony, denied that Walker had ever made any deliveries of narcotics for him (R. 290).

In further rebuttal Lovie Hamilton testified that in January 1951, Walker, who was then her "boy friend," tried to persuade her, even by threatening

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[2] Frank Brooks and Horace Cartwright, co-defendants who pleaded guilty, testified as to the two sales of heroin to Hunter in March 1951, implicating themselves and "Kid," but exculpating petitioners, whom they claimed they didn't know (R. 160-166, 178-186, 200-204). One Theodore Harris testified that petitioner Johnson was with him in Brooklyn from 6:00 p.m. to about 11:30 p.m. on March 12, 1951 (R. 206-208).

to kill her, to "plant" a package of "dope" in Johnson's apartment, stating that he was in trouble and that "I'm not going to jail and leave him out here in the street" (R. 284-286).

The defense then, for the purpose of corroborating Johnson's cross-examination testimony concerning his extortion checks, sought to introduce into evidence the testimony of David Mindlin, a licensed check casher, to the effect that certain checks sent through Johnson's numbers bank were marked "Stopped payment" (R. 290-292). The trial court refused to admit such testimony (R. 292).

Motion for a new trial.—On June 12, 1953, the trial court, after a hearing, denied petitioners' motion for a new trial on allegedly newly discovered evidence. Petitioners alleged that, in another trial in the same court, Hunter had admitted that he had been convicted of "possession and sale" of narcotics, and argued that he had therefore perjured himself on cross-examination when "he denied having ever possessed, sold, bought, used or delivered narcotics." This perjury, they urged, denied petitioners a fair trial "by denying to them a long cross-examination which would have, without doubt, created an impression". (R. 5-6, 13, 340-343, 344-345.)

On appeal, the judgments of conviction were affirmed (R. 363-364). The Court of Appeals for the Second Circuit found that petitioners "have made no showing whatever" either as to when they discovered the new evidence or what diligence they employed in their search therefor. The court also

noted that testimony of Hunter at the earlier trial, which had not been referred to by petitioners but which the trial court could have judicially noticed, disproved the alleged perjury, since Hunter had testified "that the police arrested him for possessing firearms, and found on his person capsules of heroin; that he had taken these from his 'lady friend' and never attempted nor intended to sell them, nor to use them for himself; and that although he pleaded guilty to 'possession and sale,' in fact he was guilty only of possession. * * *" (R. 361-362) [3]

ARGUMENT

1. Petitioners' contention (Pet. 13-15) that the trial court abused its discretion in denying their motion for a new trial raises no question of merit. Petitioners' allegations on their face had no tendency to cast doubt on the correctness of the verdict. Since Hunter had admitted a conviction for possession of narcotics, as well as other convictions, his denial that he sold narcotics, even if it had been, as it was not, shown to be false, obviously could have none of the importance with which petitioners now seek to endow it. At the very most, petitioners' allegations on their face showed only a tendency to impeach Hunter slightly beyond the impeaching evidence adduced on cross-examination. This was no ground for a new trial. See *Murphy* v. *United States,* 198 F. 2d 87 (C.A. D.C.); *Gage* v. *United States,* 167 F. 2d 122 (C.A. 9); *Brown* v. *United States,* 32 F. 2d 953 (C.A. D.C.); *Casey* v. *United*

[3] The relevant excerpts from Hunter's testimony in the earlier case appear in the Appendix, *infra,* pp. 17-22.

States, 20 F. 2d 752 (C.A. 9), affirmed, 276 U.S. 413.

Furthermore, since it appeared from petitioners' own application that the alleged new evidence was obtained from accessible public records, it manifestly could not have been newly discovered evidence. *Green, Moore & Co., Inc.* v. *United States*, 19 F. 2d 130 (C.A. 5), certiorari denied, 275 U.S. 549; *United States* v. *Lento*, 78 F. Supp. 374 (E.D. Pa.). On this basis alone it is clear that the trial court was justified in denying their motion. *Lawrence* v. *United States*, 196 F. 2d 48 (C.A. D.C.), certiorari denied, 343 U.S. 981; *Brandon* v. *United States*, 190 F. 2d 175 (C.A. 9); *Gage* v. *United States*, 167 F. 2d 122 (C.A. 9); *Wagner* v. *United States*, 118 F. 2d 801 (C.A. 9), certiorari denied, 314 U.S. 622; *Long* v. *United States*, 139 F. 2d 652 (C.A. 10); cf. *United States* v. *Cordo*, 186 F. 2d 144 (C.A. 2), certiorari denied, *sub nom. Minkoff* v. *United States*, 340 U.S. 952.

The argument that if Hunter had admitted dealing in narcotics petitioners could have cross-examined him as to whether he turned informer to protect his illicit activities is a complete nonsequitur. If petitioners had any basis for belief that Hunter had conspired with the narcotics agent to falsify charges against them, it is difficult to see how his denial of prior dealings in narcotics precluded them from cross-examining him concerning such conspiracy. If petitioners had no basis for insinuating that Hunter had so conspired, they could not properly have questioned him along those lines, even if Hunter had admitted prior dealings in narcotics, since it does not necessarily follow that be-

cause a witness once dealt in narcotics, he would conspire to conjure false charges against another. Cf. *United States* v. *Pugliese*, 153 F. 2d 497, 498-499 (C.A. 2). It appears from their petition (Pet. 14) that petitioners had no basis in fact for such belief; all they claim is that, by questioning on cross-examination, they might have injected such insinuations into the case.

In any event, as the court below noted (R. 361-362), the court records of the earlier trial, which are a matter of judicial notice, do not substantiate petitioners' claim (Pet. 13) that Hunter perjured himself in denying at the trial in the instant case that he had ever sold narcotics. In the previous case, Hunter had qualified his admission that he had been convicted of "possession and sale" of narcotics [4] by explaining that he had possession only because he had taken narcotics from his "lady friend," and that he had never intended to sell them. Since the relevant portions of Hunter's previous testimony disprove petitioners' claim of perjury, there was no new evidence as a basis for a new trial.

2. Equally without merit is petitioners' contention (Pet. 16-17) that they were prejudiced by the trial court's refusal to allow their witness, Mindlin, to testify on rebuttal concerning the stoppage of payment on certain checks cashed by Walker through Mindlin's agency. The fact that Walker had cashed some questioned checks through Mind-

[4] Under the federal statute, 21 U.S.C. 174, *supra*, there is no crime of possession. Possession is presumptive evidence of a substantive offense of selling, receiving, etc.

lin's agency did not necessarily tend to corroborate, as petitioners claim (Pet. 17), Johnson's cross-examination testimony that he had had a fight with Walker over such checks and that the latter had threatened to seek revenge. At the least, as the court below held (R. 362), the exclusion of this rebuttal testimony "was within the trial court's discretion to limit testimony on a collateral issue." See *United States* v. *Hiss*, 185 F. 2d 822, 832 (C.A. 2), certiorari denied, 340 U.S. 948.

Petitioners' further claim (Pet. 17) that the exclusion of Mindlin's testimony precluded them from impeaching Walker's credibility by showing that he was an extortionist is also in error. Since such testimony related to a collateral matter, petitioners were bound by his denial on cross-examination that he did not extort the checks in question.

CONCLUSION

The judgment below is correct, and the petition for certiorari presents no question warranting further review by this Court. It is therefore respectfully submitted that the petition should be denied.

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FEBRUARY 1954.

APPENDIX

Excerpts from Testimony in *U.S.A.* v. *Louis Taylor, et al.*, No. C-136-343, S.D.N.Y. (pp. 30-31):

Q. In addition to the current sentence you are serving, at various times in the past throughout your life you have been convicted of crime? A. This is right.

Q. In some cases you got a suspended sentence and in others you received a jail term, is that right? A. That is right.

Q. And you served those sentences, is that correct. A. That is right.

Mr. Cohn: I have no further questions, your Honor.

Mr. Altman: May I lean on here, if your Honor pleases?

The Court: You may.

Cross Examination by Mr. Altman:

Q. Mr. Hunter, where are you presently serving a jail sentence? A. Dauphin County.

The Court: D-a-u-p-h-i-n County?

Mr. Cohn: That is correct, your Honor.

Q. Where is that located? A. Pennsylvania.

Q. And was your conviction had in a court in Pennsylvania? A. Yes.

Q. Was that a State or Federal conviction? A. A County conviction.

Q. A County conviction? A. Yes.

Q. State conviction, right? A. Yes.

Q. What was the charge upon which you were convicted? A. Firearms, bribery, aiding and abetting and possession and sale.

Q. Possession and sale of what? A. Narcotics.

Q. Narcotics? A. Yes.

Q. And there was a firearm, did you say? A. Yes.

Q. And there was bribery. A. Yes.

Q. And what was the sentence that was imposed upon you? A. 23 months.

Q. 23 months? A. Yes.

Q. And that is what you are presently doing, right? A. That is correct.

Q. And in connection with that did you stand trial, or did you plead guilty? A. Pleaded guilty.

Q. All right. Now, did you plead guilty to bribery? A. Yes.

Q. And you pleaded guilty to the sale and possession of narcotics? A. Yes.

Q. And you pleaded guilty to the possession of a firearm? A. Yes.

Q. Now, prior to that conviction, when immediately before that conviction had you again been convicted? A. In '49.

* * * * *

Excerpt from Cross Examination by Mr. Altman (pp. 84-87):

Q. All right. Now, you also told us that you had sold narcotics. A. That is correct.

Q. Did you sell narcotics for the Bureau? A. No, I didn't.

Q. You sold them for yourself? A. That is correct.

Q. Did you sell them here in New York or did you sell them in Buffalo, or did you sell them in Pennsylvania? A. In Pennsylvania.

Q. In Pennsylvania. Did you sell them on more than one occasion. A. No, I didn't.

Q. Only one time? A. That is correct.

Q. How much of a quantity did you sell? A. It wasn't no quantity sold.

Q. No quantity? A. That is correct.

Q. But didn't you say you sold narcotics? A. That is correct.

Q. How much narcotics did you sell? A. I didn't sell any.

Q. You mean you were caught before the actual transaction? A. Yes.

Q. How much were you supposed to sell. A. You mean, how much did I have?

Q. You made a deal to sell narcotics, didn't you. A. I didn't sell any narcotics.

Q. I say, you made a deal to sell narcotics? A. No.

Q. Did you have a transaction whereby you were supposed to get money in exchange for narcotics? A. No.

Q. Did you plead guilty to selling narcotics? A. Yes, I did.

Q. Was there any amount of narcotics involved in that transaction? A. Only what I had.

Q. How much did you have? A. 18 capsules.

Q. 18 caps? A. That is right.

Q. How much were you to receive for them? A. It wasn't to receive anything.

Q. You were giving them away? A. No.

Q. Well, you were going to get rid of 18 caps of heroin, is that right? A. No, I wasn't going to get rid of them.

Q. Were you going to sell them? A. No.

Q. You were going to keep them? A. No.

Q. You weren't going to give them away? A. That is correct.

Q. You were going to give them away or you weren't? A. You confuse me when you say give them away.

Q. I try not to. You had 18 caps. A. 18 capsules of heroin was caught in my possession.

Q. Yes? But you pleaded guilty to a sale. A. That is correct.

Q. Isn't that so? A. That is correct.

Q. Now, had you made any attempt to sell narcotics A. No, I hadn't.

Q. Then you pleaded guilty to something of which you were not guilty? A. At that time, yes.

Q. Now, you had 18 caps, expecting to sell them, didn't you? A. There was no intentions of selling them.

Q. No intentions of selling them? A. That is correct.

Q. Well, you weren't an addict yourself, were you? A. No.

Q. So that you had 18 caps of heroin, you didn't intend to sell them and you didn't intend to use them for yourself; is that what you want us to understand? A. That is correct.

Mr. Altman: No further questions.

Redirect Examination by Mr. Cohn (pp. 140-141):

Q. Mr. Hunter, in response to some questions by Mr. Altman I believe, he was asking you about the case for which you are serving 23 months now and you stated a number of things to which you had pleaded guilty, and then I

think it was Mr. Altman who asked you about these capsules of heroin, and you said that you were not going to sell them; you were not going to give them away, and you were not going to use them. Will you explain to the Court and jury just what happened with reference to the 18 capsules of heroin?

Mr. Altman: I object to that, if your Honor pleases.

The Court: I will allow it.

A. You mean to explain how I happened to come in possession of them?

Q. Yes. I think that would clarify it.

Mr. Altman: I object.

The Court: I will sustain the objection to that question.

Q. Not how you came into possession.

The Court: How he came into possession is of no concern of anybody here.

Mr. Cohn: All right.

The Court: I allowed the question for a different reason.

Mr. Cohn: I merely want to clarify it, your Honor.

The Court: You may clarify it, but how he came into possession is of no consequence.

Mr. Cohn: All right.

Q. Don't tell us how you got it, but did those 18 capsules belong to you? A. No, they did not.

Q. They belonged to someone in whose apartment you were at the time? A. It was not in the apartment. I had taken them from my lady friend. I had taken them from her when we were on the street.

Q. Then you had them in your possession, is that correct? A. That is correct.

Q. And then the police came and arrested you for the possession of a firearm? A. That is correct.

Q. They found these capsules and that was that? A. That is correct.

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End